Sec. 809.25(3)(a)'s statutory mandate clearly requires a timely frivolity motion in the Court of Appeals and a finding by the Court of Appeals before a frivolity award can be made. A reference to Sec. 809.01(4) establishes that the term "court" as used in Chapter 809 means the Court of Appeals or the Supreme Court if the case has reached that level. The plain language of Sec. 809.25(3)(a) does not permit a trial court to award appellate frivolity fees. Such authority is vested in the Court of Appeals.

Sec. 809.25(3)(c) sets forth the following prerequisite for finding an appeal to be frivolous:

> "In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

Once again, the clear language of the statute requires the Court of Appeals to make the necessary determination. After finding an appeal to be frivolous, the Court of Appeals then remands the case to the trial court with directions to determine the amount of the appellate assessment. See *Lessor v. Wangelin*, 221 Wis. 2d 659, 669, 586 N.W. 2d 1 (Ct. App. 1998).

An examination of case law confirms that the authority to determine appellate frivolity and order such award has been vested in the Court of Appeals. Citing *J.J. Andrews, Inc. v. Midland*, 164 Wis. 2d 215, 225, 474 N.W. 2d 756 (Ct. App. 1991), the Court in *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 841, 520 N.W. 2d 93 (Ct. App. 1994) noted that "[w]e decide as a matter of law whether an appeal is

frivolous." The Court referred to Sec. 809.25(3)(c)'s requirement that it must find that the appeal was filed in bad faith or was without a reasonable basis. *NBZ*, 185 Wis. 2d at 841.

In *Lucareli v. Vilas County*, 2000 WI App. 157, par. 9, 238 Wis. 2d 84, 89, 616 N.W. 2d 153 (Ct. App. 2000), the Court noted that only an appellate court can find an appeal frivolous under Sec. 809.25(3). The Court in *Sheard v. Sheard*, 129 Wis. 2d 308, 309, 384 N.W. 2d 712 (Ct. App. 1986) held that a claim under Sec. 809.25(3) must be submitted no later than the filing of the respondent's brief. In order to find an appeal frivolous and award appellate fees, the entire appeal must be determined to be frivolous. See *Tennyson v. School Dist.*, 2000 WI App. 21, par. 35, 232 Wis. 2d 267, 290, 606 N.W. 2d 594 (Ct. App. 1999) and *Manor Enterprises v. Vivid, Inc.*, 228 Wis. 2d 382, 403, 596 N.W. 2d 828 (Ct. App. 1999). Furthermore, with respect to Morters' defense of the cross-appeal, the Court in *Peck v. Meda-Care Ambulance Corp.*, 156 Wis. 2d 662, 676-677, 457 N.W. 2d 538 (Ct. App. 1990) held that Sec. 809.25(3)'s language does not permit the award of frivolous appeal costs and fees to an appellant. According to *Wisconsin Chiropractic Ass'n v. State of Wisconsin Chiropractic Examining Board*, 2004 WI App. 30, footnote 15, 269 Wis. 2d 837, 676 N.W. 2d 580 (Ct. App. 2004), Sec. 809.25(3) has no application when the party requesting the fees is the appellant.

The Wisconsin Supreme Court's recent decision filed on June 22, 2005 in *Howell v. Denomie*, 2005 WI 81, par. 9, ___ Wis. 2d ___, 698 N.W. 2d 621, 626-627 (2005) reaffirmed that an appellate court decides whether an appeal is frivolous and orders the imposition of appellate frivolity costs. *Howell* permitted the Court of Appeals to raise the appellate frivolity issue on its own motion, but it must give notice that it is considering the issue and give the parties the opportunity to be heard. *Howell*, 2005 WI 81 at par. 19, 698 N.W. 2d at 629.

The language of Sec. 814.025 itself shows that it does not cover appellate frivolity. Sec. 814.025(1) provides as follows:

> "If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, *at any time during the proceedings or upon judgment*, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees." [Emphasis added]

By its very terms, the statute only covers frivolity during the trial court proceedings and upon judgment. It does not cover post judgment frivolity matters.

Case law supports this interpretation. In *In Matter of Estate of Bilsie*, 100 Wis. 2d 342, 357, 302 N.W. 2d 508 (Ct. App. 1981), the Court held that *Sec. 814.025 does not permit the assessment of attorney's fees for a frivolous appeal.* The Court in *Peck* noted that Sec. 814.025 does not apply to appeals. *Peck*, 156 Wis. 2d at 675. Sec. 814.025 simply does not give Wisconsin trial courts the authority to make an appellate frivolity determination. Such authority is vested in the appellate courts pursuant to Sec. 809.25(3).

Despite the presentation of ample authority demonstrating that the trial court did not have the authority to make an appellate frivolity award, the Circuit Court ignored the same. Instead, the requirements of a Sec. 809.25(3) motion, an appellate frivolity finding by the Court of Appeals, and Mr. Morters' constitutional rights were considered a "formality." Comments made by Judge Sankovitz at the remand hearing suggest that he did not read the briefs submitted.

Serious due process problems occur when the lower courts are allowed to treat compliance with statutes and case law as mere formalities. By failing to rectify the Circuit Court's disregard of due process in the Barr reconsideration matter, the Wisconsin appellate courts have promoted an even greater deprivation of due process in the Aiken & Scoptur case. Since the Wisconsin appellate courts

have not acted to protect due process rights guaranteed by the United States and Wisconsin Constitutions, the Supreme Court must intervene to compel constitutional compliance in accordance with its supervisory role discussed in *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981).[3] The Court's intervention is particularly vital where the case involves a punitive statute.[4]

CONCLUSION

For the reasons set forth in this Petition, Ronald W. Morters' Petition for Rehearing of the Order denying his Petition for Writ of Certiorari should be granted, and it is respectfully requested that the Court grant this Petition for Rehearing.

Dated this 21st day of October, 2005.

Respectfully submitted,

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SUPREME COURT RULE 44 CERTIFICATE

I hereby certify to this Honorable Court that the reasons for seeking this Petition for Rehearing are limited to intervening circumstances of a substantial or controlling effect and to other substantial grounds not previously presented and that this Petition is being presented in good faith and not for delay.

RONALD W. MORTERS
Petitioner, Pro Se

[3] See discussion on page 21 of Petition for Certiorari.

[4] As noted on page 22 of the Petition for Certiorari, the frivolity statute has a punitive purpose.